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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/553,363	10/14/2005	Marie-Pascale Latorse	P/4976-19	9080
2352 7590 09/22/2011 OSTROLENK FABER LLP 1180 AVENUE OF THE AMERICAS NEW YORK, NY 10036-8403				
EXAMINER				
PRYOR, ALTON NATHANIEL				
ART UNIT		PAPER NUMBER		
1616				
MAIL DATE		DELIVERY MODE		
09/22/2011		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary**Application No.**

10/553,363

Applicant(s)

LATORSE ET AL.

Examiner

ALTON PRYOR

Art Unit

1616

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 August 2011.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ An election was made by the applicant in response to a restriction requirement set forth during the interview on ____; the restriction requirement and election have been incorporated into this action.
- 4) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 5) ☒ Claim(s) 1, 15-17 and 23 is/are pending in the application.
- 5a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 6) ☐ Claim(s) ____ is/are allowed.
- 7) ☐ Claim(s) 1, 15-17 and 23 is/are rejected.
- 8) ☐ Claim(s) ____ is/are objected to.
- 9) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 10) ☐ The specification is objected to by the Examiner.
- 11) ☐ The drawing(s) filed on ____ is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 12) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-CIB-08)
Paper No(s) Mail Date ____

- 4) ☐ Interview Summary (PTO-413)
Paper No(s) Mail Date ____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: ____

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1,15-17,23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Foor. Foor et al. teach a fungicidal composition comprising fluopicolide and chlorothanil (page 44 lines 7 - 11, page 50 Table A Compd No. 1). Foor et al. teach that to the composition can be added diluents and surfactants (page 44 lines33-35). Foor et al. teach a method of applying the composition to vegetable and fruit crop in order to control fungi growth (page 48 line 29 - page 49 line 22. Floor et al. teaches all that is recited in claims 1,15-17,23 except for fluopicolide to chlorothalonil in a ratio of from 1:20 to 1:2.

Foor et al. teach a fungicide composition comprising fluopicolide and chlorothalonil. Applicants also acknowledged that Foor et al. are replete with teachings of the ratios of compound (a), including fluopicolide, to a compound (b), which did not include chlorothalonil. (Id.) These teachings encompass the claimed ratio range of 1/20 to 1/2. While Foor et al. did not explicitly disclose a ratio or ratio range for the combination of fluopicolide and chlorothalonil, we first find ratios for other combinations with fluopicolide suggests the same ratios for any of Foor et al.s' fungicide compositions. Thus, it would have been obvious to a person of ordinary skill in the art at the time of the invention to

prepare and use a fungicidal composition comprising fluopicolide and chlorothalonil in a weight ratio range of 1:20 to 1:2. It is concluded that the ratio range of from 1/20 to 1:2 would have been obvious because optimizing the ratio would have been within the level of ordinary skill in the art. See *In re Aller*, 220 F.2d at 456.

Dependent claim 15 recites "[t]he composition of claim 1 further comprising a member selected from the group consisting of an agriculturally acceptable support, a carrier, a filler, and a surfactant." Foor et al. teach this further limitation by disclosing that their compositions comprise at least one carrier.

Dependent claim 16 recites, "A method for combating and controlling phytopathogenic fungi of crops comprising applying an effective and non- phytotoxic amount of a composition according to claim 1 to seed, plant and/or to fruit of the plant or to soil in which the plant is growing or in which it is desired to grow." Dependent claim 17 further recites that "the plant is selected from the group consisting of potato, vegetables, and lawn." Claims 15-17 are obvious because Foor et al. teach a method of applying its compositions to vegetable and fruit crops to control fungal growth.

Applicants contend that they have discovered a combination that clearly exhibits synergism in Examples 1 and 2 and is neither disclosed nor suggested by the cited art. Applicants argue that the claimed combination of fungicides provides unexpected/synergistic results (in accordance with the Colby formula) that allows a reduction of the chemical substances spread into the environment and a reduction of the cost of the fungal treatment. The issues with respect to this rejection are: whether the record supports the Examiner's conclusion that the cited references would have

made the claimed composition and method prima facie obvious, and if so, whether Applicants have provided evidence of unexpected results such that the totality of evidence weighs in favor of nonobviousness.

The Examiner would like to point out that Foor et al. state, "It is found that compositions containing the compound of Formula I [i.e., fluopicolide] and fungicides with a different mode of action exhibit synergistic effects." (Foor at 49.)

The Examiner would like to also point out that the Principle of Law states, "[W]hen unexpected results are used as evidence of nonobviousness, the results must be shown to be unexpected compared with the closest prior art." In re Baxter Travenol Labs., 952 F.2d 388, 392 (Fed. Cir. 1991). "Only if the 'results of optimizing a variable' are 'unexpectedly good' can a patent be obtained for the claimed critical range." In re Geisler, 116 F.3d 1465, 1470 (Fed. Cir. 1997).

"[B]y definition, any superior property must be unexpected to be considered as evidence of non-obviousness. Thus, in order to properly evaluate whether a superior property was unexpected, the [fact-finder] should..., consider[] what properties were expected." Pfizer, Inc. v. Apotex, Inc., 480 F.3d 1348, 1371 (Fed. Cir. 2007).

To the extent Applicants contend that "they have discovered a combination that ... is not disclosed or suggested by the cited art" the Examiner disagree. As discussed in this rejection supra, a skilled artisan would have found it obvious to optimize the weight ratio range for fluopicolide/chlorothalonil to within the instantly claimed recited range ratio of from 20/1 to 1/2 based upon Foor et al.'s disclosure of the general ranges of components for its fungicide compositions.

The Examiner remains unpersuaded by Applicants' assertion of unexpected results. According to Applicants, the instantly claimed combination of fungicides provides the unexpected result of "exhibit[ing] a synergistic effect that allows for a reduction of the chemical substances spread into the environment and a reduction of the cost of the fungal treatment." (App. Br. 10.) However, Foor et al. disclose that their compositions exhibit synergism. Thus, a skilled artisan in the field would have expected a synergistic result from the combination. In re Diamond, 360 F.2d 214, 217 (CCPA 1966) (affirming obviousness where the evidence showed that synergism was expected because combined drugs targeted different cellular mechanisms, and no evidence to the contrary was produced). Because synergy was expected, that factor is not persuasive of nonobviousness. See, e.g., Pfizer, 480 F.3d at 1371.

We conclude that claims 1,15-17,23 are obvious over Foor et al.

Telephonic Inquiry

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ALTON PRYOR whose telephone number is (571)272-0621. The examiner can normally be reached on 8:00 a.m. - 4:30 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Alton N. Pryor/
Primary Examiner, Art Unit 1616